91-109

Supreme Court, U.S.
FILED
MAR 19 1991

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

AMBROSE W. J. CLAY, PETITIONER

v.

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, etc.

RESPONDENT.

"PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TENNESSEE, MIDDLE DIVISION"

PETITION FOR WRIT OF CERTIORARI

AMBROSE W. J. CLAY, PRO SE
P.O. BOX 22642
Nashville, Tennessee 37202

QUESTIONS PRESENTED

1. WHETHER, a Municipality can legally confiscate Petitioner's tangible properties, including a truck, automobile components, lumber, rocks, and miscellaneous materials, and give the same away to a demolishing Company without just compensation for the owners and or the parties in interest.

2. WHETHER, the courts involved, had authority under the Slum Clearance Act of the State of Tennessee, or any other judicial manifestations to deny Petitioner certain provisions of law incorporated in (T.C.A.) § 13-21-103-(6) respecting certain materials Petitioner had salvaged for the purpose of using or selling the same.

THE PARTIES BELOW

In the Second Circuit Court For Davidson County Tennessee, were Roosevelt Glass and Ambrose W. J. Clay, Plaintiffs and the Metropolitan Government of Nashville and Davidson County, were the Defendant, in the Court of Appeals of Tennessee, Middle Division, Ambrose W. J. Clay, proceeded as Plaintiff/Appellant, and the Metropolitan Government of Nashville and Davidson County,etc, were Defendant/Appellee in the Court of Appeals of Tennessee, Middle Division, the court whose judgment is sought to be reviewed.

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APPENDIX:

A. Judgment, Second Circuit Court for Davidson County, dated Jun 7, 1989. And Order dated May 23, 1988.

B. Statement of Petitioner,dated 3-5-91 Opinion, C A, dated Mar. 1, 1985, on similiarly case.

C. Opinion, C A, dated July,11,1990

D. Order, Supreme Ct. of Tennessee dated Oct. 22, 1990

TABLE OF AUTHORITIES

Cases:

Union Joint Stock Land Bank of Louisville

V. Knox County, 20 Tenn. App.

Van Camp v. Van Camp, Mich. 688,289
N.W. 297,300

Yarbrough v. Mallory 225 Ala.
579,144 So.

Mitchel v. Sage Stores Co.
157 Kan.

Mammoth Cave Production Credit Assn. v.

Oldham, Tenn. App.
1977,569, S.W. 2d 833

Winters v. Sawyer
255 Tenn. 113 463 S.W. 2d 705 (1970)

Robertson v. Wegmann, 436

Bennet v. Tucker, 827 F. 2d 63 (7rh Cir.(1978)

INTHE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMBROSE W. J. CLAY,

PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE, MIDDLE DIVISION, AT NASHVILLE

PRAYER

Your Petitioner Ambrose W. J. Clay,Pro Se, having been granted extensions of time in which to file a petition for a writ of certiorari, said extension of time covered the period of Feb. 19, 1991, and subsequent thereto, for good cause shown, was further extended to March 21, 1991, respectively, prays that a writ of certiorari issue to review the Opinion of the Court of Appeals of Tennessee, Middle Division, entered and subsequently, the application for permission to appeal to the Supreme court of Tennessee.

The Supreme Court of Tennessee denied Petitioner's Application for permission to Appeal, October 22, 1990.

The opinion of the Court of Appeals affirming the Judgment of the Second Circuit Court, entered the 7th day of June, 1989, dismissing Petitioner's complaint has not been reported. Opinions, Orders and Judgments are included in the Appendix A, B, C, and D.

The opinion of the Court of Appeals of Tennessee, Middle Division above stated is find in Appendix A. The Order entered the 23rd day of May, 1988, by the Second Circuit court of Davidson County is incorporated in Appendix B.

An Order was further entered Jan. 12, 1990, by the Second Circuit Court for Davidson County, said Order is incorporated in Appendix C.

The Court of Appeals of Tenn., Middle Division, entered an Order July 11, 1990, and said Order is incorporated in Appendix D. An Opinion on a similar case granting relief involving property rights,& certain materials was filed and Affirmed Mar. 1, 1985, is incorporated in Appendix E.

The decision of Winters v. Sawyers, 225 Tenn., 113, 465 S.W. 2d 705 is not included.

STATEMENT OF JURISDICTION

Petitioner claims jurisdiction of this court on the Basis of Article III" 1.

"The Judicial Power of the United States shall be vested in one Supreme Court,and in such inferior courts as the Congress may from time to time ordain and establish ...and, on the basis of Federal Question Jurisdiction, 28(USC) § 133 and Rule 10. 1. (c) of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the constitution of

the United States provides in relevant Part:

"The Judicial Power shall extend to cases in Law and Equity, arising under this constitution, the laws of the United States,and Treaties made,or which shall be made under their authority,--to all cases affecting Ambassodors,other public Ministers and consuls;--to all cases of admiralty and maritime Jurisdiction, to controversies to which the United States shall be a party; to controversies between two or more states; between citizens of the same states claiming land under grants of different States, and between a state, or the citizens thereof; and foreign states, citizens or subjects"

TREATIES INVOLVED

(Not applicable in this case)

STATUTORY PROVISIONS INVOLVED

42 § 1983

Civil action for deprivation of rights:

"Every person who,under color or any statue,ordinance, regulation,custom,or usage, of any State or Territory or the District of Columbia,subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and

at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

R.S. § 1979, Pub.L 96-170, § 1. Dec.29, 1979,93 Stat.1284

Other Statutes (TCA) § 13-21-103 (6) and the 5th Amend. to U.S. Constitution

The very custom of the Respondent in cause is so widespread, that it is substituing the custom for the statute, by gross violations of the statutes that authorized it to act, and such violations have risen to level of law, affecting the Petitioner and the citizens of said respondent. The statute authorizes the municipality by ordinances to create a Public Planning and Housing, under (TCA) § 13-21-103 (6) but said ordinances by custom abridges the rights of the Petitioner and simlarly situated persons.

STATEMENT OF THE CASE

This cause was filed in the Davidson county Circuit Court by the Petitioner,Ambrose W. J. Clay, to enforce Appellant's rights for damages caused by the Appellee unwarranted action in removing the Appellants' valuable tangible properties on the land owned by the said Appellants and by bid,included the materials as a part payment to the Wrecking Company authorized according to said bid as part payment in the removal of the materials which were vested in the owner and the party in interest.

Thus, the Petitioner was denied just compensation as the direct result of its action, contrary to the provision of property interests as guaranteed by the 5th Amendment to the constitution of the United States.

This cause came on to be heard on Wednesday May 24, 1989,before the Honorable Harry Lester,Circuit court Judge for Davidson County,Tennessee.

The petitioner took no exception to the concomnation of the property, but procured a permit to demolish the house and remove the debris from the premises themselves.

Petitioner preserved the good materials and salvaged the good lumber,rocks,blocks,one motor, a Van and miscellaneous materials,such as electrical wires and components, including one truck.

The Appellee without consent or notice, after having issued a permit for petitioner to demolish and remove the debris, employed the Wrecking Company to remove the valuable materials which the petitioner had salvaged and stacked up for reuse or to sell.

This action was contrary to the law which authorizes the Appellee to act. The Statute provides as follows:

Captioned as "THE PUBLIC PLANNING & HOUSING" under(TCA) § 13-21-103 which was adopted by ordinance by Respondent, said provision States

"Upon the adoption of an ordinance finding that dwelling conditions of the character described in § 13-12-102 exist within a Municipality, the governing body of such municipality is hereby authorized to adopt ordinances relating to dwelling within such municipality which are unfit for human habitation"

Such ordinances shall include the following provision: (1) (2) (3) (a) (b) (4) (5)

which states,"That, if the owner fails to comply with an order to remove or demolish the dwelling, the public officer may cause such dwelling to be removed or demolished"

(6)"That the amount of the cost of such repairs, alterations or improvements, or vacating and closing, or removal or removal or demolition by the public officer shall be a lien against the real property upon which such cost was incurred.If the dwelling is removed or demolished by the public officer,he shall sell the materials of such dwelling and shall credit the proceeds of such sale against the cost of removal of demolition, and any balance remaing shall be deposited in the Chancery Court by the publi officer shall be secured in such manner as may be directed by such court, and shall be disbursed by such court to the person found to be entitled thereto by order or decree of such court,provided, however, that nothing i this section shall be construed to impair or limit in any way the power of the municipali ty to define and declare nuisances and to cause their removal or abatement, by Summary proceedings or otherwise,"

Act of 1939 Ch 152 § 3, et seq.

Your petitioner holds that the Municipality violated all of the above sections,and as such, have replaced the Statute for the custom they have substitued for the law.

It is a fact,that many citizens of the municipality have suffered losses as the direct result of the violations of the law upon which the citizens and petitioner rely upon for protection.

It also, appears that the courts of Tenn., have supported the actions of the municipalities and by so doing, have complicated the matter involving the rights of the petitioner and the citizens of said municipality.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the Constitution of the United States, provides in part, that

no citizens of the United States shall be deprived of property interest without due process of law. Due Process of Law in each case means such an exercise of the power of the Government as the settled maxims of law permit and sanction, and under such safeguard for protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs" cooley, Const. Linn 441.

In this class of cases involving condemnation of property, the maxims prescribed are the same as the law. which states the public officer shall,if the property is demolished, sell the materials of such dwelling and shall credit the proceed of such sale against the cost of the removal or demolition, and and balance remaining shall be deposited in the Chancery court by the public officer shall be secured in such manner as may be directed by such court, and shall be dis-

bursed by such court to the person found to be entitled thereto by final order or decree of such court...

In the case at bar and in many other cases this is not done, but said Respondent utilizes the custom of taking property or materials, of the owners or the parties in interest, and give the same away as a bid consideration to the Wrecking or Demolishers companies who did the bidding.

In a similar case styed Ambrose W. J. Clay and Canary C. McCord Hogan vs. Metro Govt. of Nashville & Davidson County, Case # 84-10-11 Davidson Law, unreported, the court said: "The owner of property is competent to give testimony as to the property's value" Union Joint Stock Land Bank of Louisville v. Knox County, 20 Tennessee App. 273,97 S.W. 2d 842 (1936)

"Mr. Clays's testimony is evidence on which the trial Judge could conclude that the value of the house at the time of its destruction was $6,000.00." Therefore, we find this

issue to be without merit."

The Judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for further proceedings necessary. Tax the costs on Appeal to the Appellant. Signed, Ben H. Cantrell, Judge.

In the case at bar, the pleadings states the costs of materials salvaged, including lumber,rocks, motor, transmission and misc. valued at$12,000.00. This was substatntiated by testimonies of the owner and the party in interest,which the court below paid no attention to.

Moreover, the lower court demonstrated propensities of exetreme prejudicial averments on ever issue raised by the Petitioner and continued to demonstrate a unilateral manifestation toward the Respondent, to the injury of the Petitioner.

The Appellate Court in the case at bar, ignored it previous ruling, and deprived the petitioner of his rights to receive just compensation for the property wrongfully taken and divested the title and interests out of Petitioner's hand and allocated the property as a pay factor on the bid of the Wrecking Company who removed the same.

Moreover, the court by its ruling deprived petitioner of his right to receive just compensation for the property wrongfully taken and divested the title and interest of Petitioner's of the rights guaranteed under the just compensation doctrine, which is supported by the constitution of the United States, and also, supported by Statue authorized by the State of Tennessee, which authorizes municipalities to inauguarate ordinances to deal with properties under their jurisdiction

whose properties are vested in the owners and or the parties in interest.

The Supreme Court of the State of Tenn., declined to grant Petitioner his application to appeal the decision of the courts below,and by so doing, in essence denited Petitioner's his Civil Rights, and the right to be compensated for property which was vested in the owner and or the parties in interes.

On the basis of the Court of Appeals affirming the Decision of the Second Circuit Court of Davidson County, case No. 84-10-11 Davidson Law. unreported, and in the case at bar.

Which deals primarily with the values of properties belonging to petitioners,this petition for a writ of certiorari is filed for review, and after review the same should be remanded, and reversed to conform to a a previous ruling of the Court of Appeals of

Tennessee, Middle Division, at Nashville.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the Judgment of the Court of Appeals of Tennessee, Middle Division, at Nashville.

Respectfully submitted

Ambrose W. J. Clay, Pro Se, P.O. Box 22642, Nashville, Tennessee 37202

APPENDIX A

IN THE SECOND CIRCUIT COURT FOR DAVIDSON

COUNTY TENNESSEE

ROOSEVELT GLASS and AMBROSE W. J. CLAY Plaintiffs, vs METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Acting by and through the CODES ADMINISTRATION OF SAID GOVERNMENT, Defendant.	))))No.88C-1839))))))

ORDER

This matter came to be heard on the 13th day of May, 1988, on the Plaintiff's motion for a default judgment against Defendants, and upon Defendant, Codes Administration's motion to dismiss this action against it on grounds that it lacks the capacity to be a party in this action, and it appearing to the court that the motion for default should not be granted since Defendant, The Metropolitan Government of Nashville and Davidson County, had filed its answer within the time provided in Rule 12.01 of the Tennessee Rules of

Civil Procedure, but said Defendant should reimburse Plaintiff, Ambrose W. J. Clay,for his expenses incurred in bringing said Motion since the answer was not properly served pursuant to Rule 12-10, and it further appearing that Plaintiffs agree that plaintiffs agree that the Codes Administration lacks the capacity to be sued as a party-defendant and the proper style of this case should be: Roosevelt Glass and Ambrose W. J. Clay, plaintiffs v. Metropolitan Government of Nashville and Davidson County, acting by and through the Codes Administration of said government, defendant.

It is, therefore, ORDERED that Plaintiffs motion for a default judgment is denied.

It further ORDERED that Defendant shall reimburse the Plaintiff, Ambrose W. J. Clay for his expenses incurred in bringing the motion for a default Judgment,

It is further ORDERED that the style of this case shall be as follows:

Roosevelt Glass and Ambrose W. J. Clay, Plaintiffs v. Metropolitan Government of Nashville and Davidson County, acting by and through the Codes Administration of said government, Defendant.

ENTERED this 23rd day of May, 1988.

Signed J. Loser
Judge

APPROVED FOR ENTRY:

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY

Signed, JAMES L. MURPHY III #9589
Metropolitan Attorney
20f Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 259-6141

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was mailed to Roosevelt Glass and Ambrose W. J. Clay,P.O. Box 22642, Nashville, TN 37202, this 18th day of May, 1988.

Signed JAMES L. MURPHY III

APPENDIX B

STATEMENT OF PETITIONER

Inasmuch, as the states of the United States, and their respective elected officials, comprise respective Representations of the citizens thereof, and by oath of office, Affirmed and by Swearing to uphold and Defend the constitution of the United States, including the 5th Amendment to the constitution of the United States, involving certain property interests, and inasmuch, the State of Tennessee, by its Judicial System appear to have contravend the property rights and interest, and because of this, the Attorney General of the said State, shall be served the petition herein for appropriate consideration as the Attorney General deems proper, and that Petitioner's pleadings have by facts alleged indicated that the constitutionality of a Statue of the said State was drawn into question and this declaration is in

compliance with 28 U.S. C. § 1746, Wherefore petitioner has caused the following notarized statement to take effect.

STATE OF TENNESSEE)
COUNTY OF DAVIDSON) ss

Comes Ambrose W. J. Clay, Pro Se, after being duly Sworn or on Affirmation, states that the Attorney General for the State of Tennessee, and Counsel for Respondent, will be served this petition, and that 3 petitions will be mailed to Respondent Counsel with sufficient stamps or postages at their last know addresses.

Signed Ambrose W. J. Clay

Sworn, Subscribed or Affirmed before me P. Weeks, a Notary Public, in and for said State and County, this the 5th day of March, 1991, at Nashville, Tennessee.

Signed P. Weeks
NOTARY PUBLIC

My Commission expires; 10/9/91

AMBROSE W. J. CLAY and
CANARY CLAY McCORD HOGAN

Plaintiffs-Appellees)
)
vs)
)
THE METROPOLITAN GOVERNMENT) No. 84-10-11
OF NASHVILLE AND DAVIDSON) DAVIDSON LAW
COUNTY acting by and through)
the CODES ADMINISTRATION of) MAR 1 1985
said Government)
) RAMSEY LEATHERS,
Defendant-Appellant) Clerk. COURT OF
) APPEALS

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE THIRD CIRCUIT COURT OF
DAVIDSON COUNTY AT NASHVILLE

HONORABLE JOE C. LOSER,JR.,JUDGE

FILED: MAR 1 1985

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCURRING:

HENRY F. TODD, P.J.
CLIFFORD E. SANDERS, J.

No. 84-10-II

AMBROSE W. J. CLAY and CANARY CLAY McCORD HOGAN)DAVIDSON
) LAW
Plaintiffs-Appellees)

vs)

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY acting by and through the CODES ADMINISTRATION of said government)

Defendant-Appellant)

O P I N I O N

The issues in this case concern governmental immunity and the Trial Judge's award of damages against the Metropolitan Government of Nashville and Davidson County for the destruction of a substandard building.

In February of 1982 the plaintiffs-appellees bought a house and lot at 2210 Hermosa Street in Nashville, Tennessee for $3,500.00. As far back as 1975,through

several owners, the house had been the subject of various proceedings,inspections, finding, and orders from the Department of Codes Administration of the Metropolitan Government. On February 27, 1981 the Codes Department filed a notice of vacated property in the Register's Office of Davidson County.The notice contained the following:"For your information Section 22-1-11 of the Metropolitan Codes provides that this structure shall be repaired or demolished within one year from the date of this notice" (Emphasis in original.) The appellees admit that they had actual or constructive knowledge of the notice, knew that the house was unfit for habitation, and that the house must be repaired or demolished.

When the appellees recorded their deed on Mar. 3, 1982 they attached to it the following notice:

Pursuant to Public Law 96-247,96th Congress, Second Session, 1980, § XI A (1) § 122 (c),the undersigned hereby give notice,that the property described on attached deed, including the build thereon, is entitled to the benefits incorporated in Title 24,HOUSING AND URBAN DEVELOPMENT, § 882.10. Housing Assistant Plan (1), and that the owners will comply with the first sentence of § 3.4 Adopted by the Metropolitan Government of Nashville and Davidson Count6, Tennessee, by the solicitation of the implementation the said Public Law 96-247 (Supra).

The undersigned, First being Duly Sworn, states that he verily believes that he is entitled to the benefits herein above stated, and that it is,the responsibility of government to assist in the rehabilitation of the existing buildings of every kind forthe housing needs of the citizens of the United States.

In addition Mr. Clay testified that he had talked to Mr. Gordon, the housing Inspector supervisor for the Department of Codes Administration about making the dwelling habitable.

On July 26, 1982, the Codes Department recorded a notice in the Register's Office of Davidson County Claiming a lien on the subject property in the amount of $531.08 for cost of demolishing the building.

The notice was addressed to Charles W. French a former owner of the property. The record does not show that the notice of lien ever came to the attention of the appellees. The contract to demolish the building was let on July 9, 1982. On August 2, B & G Wrecking applied for a permit to demolish the house, showing on the application that the owner was Canary McCord, one of the appellees. The demolition took place on August 13,1982.

After the demolition Mr. Clay gave notice to Metropolitan Government of his claim for the destruction of the house, and then brought this action to recover the value of the house and some materials allegedly stored in it.

After a trial without a jury the lower court entered the following memorandum and judgment.

This cause was taken under advisement following a bench trial on December 13,19-83. It is an action for damages.

The plaintiffs are the owners of real property located at 2201-B Hermosa Street in Nashville.They acquired the property and improvements hereon in February, 1982 and their deed was promptly recorded. Six months later, without giving the owners notice of its intent to do so and without giving the owners any opportunity to be heard, the defendant, through its Codes Administration, demolished the improvement of the property and confiscated the salvage.The improvement was worth $6,000.00 before it was demolished and confiscated.

The defendant, without asserting any affirmative defenses in its answer, has argued that its actions were authorized by Chapter 22 of its code. That chapter authorizeds Metropolitan Government to demolish buildings under certain circumstances.

Ordinances and statutes such as the above should be administered with caution Winters Sawyer, 225 Tenn. 113; Jackson v. Bell,143 Tenn.

From a consideration of all the evidence in this case, it is the opinon of the court that the manner in which the ordinance has been administered is oppressive, reckless, negligent, and without caution, and that such is the proximate cause of plaintiffs' losses.

It is therefore ORDERED and ADJUDGED that the plaintiffs, Ambrose W. J. Clay and Canary McCord have and recover from the defendant, Metropolitan Government of

Nashville and Davidson County, the sum of six thousand and 00/100 ($6,000.00) dollars.

The appellant's first issue on appeal raises the claim that the Metropolitan Government is immune from liability for the destruction of the building. The Tort Liability Act, T.C.A. §29-20-101-407 provides that immunity from suit is removed from all governmental entities for harm caused by the negligent acts or omissions of any employee acting within thescope of his employment except if the injury:

(1) Arises out of the exercise of performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;...(4)Arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property.

T.C.A/ § 29-20-205 (1980)

The appellant contends that issuing an order to repair or demolish property due to its delapidated condition is a purely discretionary matter.

we might agree with the appellant on that point. However, the judgment in this case is not for issuing a notice that the property should be repaired or demolished; the judgment was award for negligently, oppressively and recklessly demolishing the appellees' we do not think the actions of the agents of the Metropolitan Government in carrying out the destruction of the property in this case come within the discretionary exception to liability under T.C.A. § 29-20-205

Neither do we think this action arises out of a failure to make an inspection or making an inadequate or negligent inspection of property. No issue is made of the Codes department's finding with respect to the deficiencies in the house which resulted in the notice to repair or demolish. So far as the record shows, all inspections were

done according to law and the results reported were justified. The complaint in this case is for demolishing the house without notice to the appellees of an intend to do so.

The second and third issues raised by the appellant will be treated together. These issues contest the lower court's implied finding that the appellees had been denied the right to due process and the explicit finding that the appellants had acted recklessly, negiligently and oppressively in the administration of its Code Enforcement ordinance. We think perhap there is aa third question in this area that should be considered. That is the Trial Judge's reliance on the holding in Winters v. Sawyer, 225 Tenn. 113, 463 S.W. 2d 705 (1970), and Jackson v. Bell, 143 Tenn. 452, 226 S.W. 207 (1920) that the statutes and ordinances involved in this case should be

administered with caution. Specifically, we are interested in whether the holdings in these cases impose on municipality a higher duty than ordinary care when the municipality is enforcing an ordinance that authorizes the destruction of property.

We will treat the last question first. In Jackson v. Bell, the Supreme Court of this state had before it the question of the constitutionality of Chapter 131 of the Public Acts of 1915, which created the Office of Fire Prevention Commissioner and vested him with powers to order building were found to be "especially liable to fire."

The Supreme court held that the powers vestedin the Fire Prevention Commissioner were valid police powers. The Court then

made a statement that almost stand alone in the opinion."The statute should be administered with caution"143 Tenn. at 462, 226 S.W. at 210.

In Winters v. Sawyer, the Supreme Court dealth with the constitutionality of an ordiance enacted pursuant to TCA §13-1201 through 13-1209, the enabling statute under which the Metro ordinance in question was enacted. The court upheld the ordinance and in doing so, used the following language:

We hold the ordinance in question to be valid and will again reiterate the statement of. Mr. Justice Green in Jackson v. Bell, supra that statutes or ordinances should be administered with caution. 225 Tenn. at 117, 463 S.W. 2d. at 707.

In the earlier case of Theilan v. Porter, 82 Tenn. 622(1885), the Court expressed a similar cautionary note when dealing with

an act that allowed Taxing Districts to condemn and abate as nuisances all houses found to be unhealty:

The responsibility of officers is certainly of a very grave character, and to be assumed only when the paramount obligation of protecting the public health and safety imperatively requires it, and justified only when the exercise of the powers conferred upon them is strictly within the line of their duty. 8s Tenn. at 628.

Do these expressions of the Supreme Court create a higher duty than ordinary care on the part of the Metropolitan Government in this case? We are not persuaded that they do. The statements in Winters and Jackson are delivered almost as asides and are certainly not responsive to any of the issues involved in either case.There is no hint in either opinion that the Court is fixing a

standard or referring to other cases that have fixed a higher standard. We think the Court could say as much for operating a train or an automobile--that they are dangerous machines and should be driven with caution.

However, ordinary care and prudence is all that is required in operating either a train or an automobile. Hurt v. Yazoo M.V. R. Co. 140 Tenn. 623,205 S.W. 437 (1918) We think that is all that is required of the persons charged with the Administration of this ordinance.

The next question is whether the appellant by the action of its agents in this case, violated a duty to the appellees or infringed on their rights to due process.As we see it these two things, in the circumstances in this case, are really the same.

If due process required that the appl-lees be given notice of the Metropolitan Government's intent to raze the structure, the failure to give that notice is a violation of duty that would also amout to negligence.

Were the appellees entitled to notice of Metropolitan Government's present intent to demolish the structure? Under the circumstances of this case we hold that they were. It should be noted that the notice placed in the record by the Metropolitan Government on Feb. 27, 1981 stated only that the property should be repaired or demolished within one year from the date of the notice. The notice does not say that "If the structure is not repaired within one year we will proceed to demolish it" Therefore, the notice of which the appellees were aware only conveyed the message that the owner had a year to repair or demolish the structure, it

it did not convey the sense that the Metropolitan Government had the present intent to demolish the structure if not repaired within one year. We think this conclusion is borne out by the applicable ordinances of the Metropolitan Government. The pertinent parts of the Codes are as follows:

" If, after notice and hearing, as provided in the preceding section, the director determines that the dwelling unfit or accessory building or structure is unfit for human habitation or use,he shall state in writing his findings of fact in support of such determination and shall issue and cause to be served upon the owner thereof an order:

(1) if the repair, alteration or improvement of such dwelling unit or accessory building or structure can be made at a cost not to exceed fifty percent of the physical value of the building or structure, requiring the owner within the time specified in order to repair, alter or improve such building or structure to render it fit for human habitation or use or to vacate and close the building or structure, or
(2)If the repair, alteration or improvement of said building or structure cannot be made at a cost not to exceed fifty (50) per cent of the physical value of the building or structure, requiring the owner within the time specified in the order to remove or demolish such building or structure.For the purposes of this section, the physical value of the building or structure,

exclusive of the value of the land shall be determined by the director, within the meaning of physical value, as herein defined.

Metropolitan Code of Nashville and Davidson County §22-1-10 (1984)

(a) If the owner fails to comply with an order to repair, alter or improve or to vacate and close the building or structure, the Director may cause such building or structure, to be repaired, altered or improved or to be vacated and closed. The director may cause to be posted on the main entrance of any building or structure so closed, a placard with the following words,"This building is dangerous and unfit for human habitation; the use or occupancy of this building for human habitation is prohibited."

Whereupon, inspection of a dilapidated building or structure is found to be unoccupied, the director shall immediately cause such building or structure to be placarded, as set forth above, without prior notice to the owner, pending notice to the owner to repair or demolish such building or structure.
(b) If necessary, such notice shall also require the building or structure or portion thereof to be vacated forthwith, securely closed by boarding up all exterior openings, and not reoccupied until the specific repairs and improvements have been completed and a valid certificate of occupancy has been issued.Such building or structure or portion thereof shall be repaired or demolished within one year from the date of such notice, except that, for cause, the director may grant one or more extensions of time or ninety (90) days each.

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The director shall cause to be posted at each entrance to such building or structure a notice stating"This building is unsafe and its use or occupancy has been prohibited by the director of the Department of Codes Administration"

Metropolitan Code of Nashville and Davidson County § 22-1-11(1984)

"If the owner fails to comply with an order to remove or demolish a building or structure,the director may cause such building or structure tc be removed or demolished to secure the intent of this subchapter.Whenever an occupied building or structure has been condemned or ordered demolished or repaired by the director,he shall notify the tenant or tenants of such action in writing,and order such tenants to vacate the premises within a specified time. if necessary, or to do and perform such acts or works as may be necessary to fulfill the orders setforth in such notice. Should such tenants fail or refuse to promptly comply with such notice or orders, they shall be guilty of a violation of this subchapter.

Metropolitan Code of Nashville and Davidson County §22-1-12(1984)

Up to a point the agents of the Metropolitan Government had followed the Code in strict detail--except, perhaps, in giving the various owners of this property too much time to bring it up to code standards.

but the notice registered on Feb. 27,1981 unmistakable an order to the owner to repair or demolish the building pursuant to Code § 22-1-11 above. Code § 22-1-12 then goes one to say,"If the owner fails to comply...the director may cause such building or structure to be removed or demolished..." It is at this point where we believe the owner of the property is entitled to notice that the director has formed the present intent to demolish the building.This is especially true where the owner has notified the director that he or she intends to repair the structure.

When the appellees bought the property in Feb. 1982, almost one year to the day after the notice was recorded in the Gegister's Office, Mr. Clay recorded a "notice" with the deed which he say was notice to all the world that he intended to repair the structure.We are not aware of any duty on the part of the

Metropolitan Government to conduct a search that would have turned up the notice. However, Mr. Clay says he talked to the housing inspector supervisor, and told him of his intent to repair the structure. Although the supervisor denies having had such a conversation with Mr. Clay, the Trial Judge obviously resolved the question of credibility in Mr. Clay"s favor. Without other real evidence in the record compelling a contrary conclusion, that determination is binding on this court. State ex rel, Balsinger v. Town of Madisonville, 222 Tenn. 272, 435 S.W. 2d 803 (1968)

In addition, the wrecking Company applied for a permit to demolish the building and showed Canary McCord,one of the appellees as the owner. Therefore, we conclude that the record shows that Mr. Clay had notified the Department of Codes Administration that he had an interest in the property and that he

intended to repair it. Under these circumstances, we think that when the Department decided to have the property demolished, the appellees were entitled to notice of that fact. The failure to give that notice was the proximate cause of the appellees' loss.

We are aware of the decisions cited in the appellants's brief in City of Dallas v. Wilson 602 S.W. 2d 113(Tex) Civ. App. (1980) and Tingle v. City of Wichita, 211 Kan. 119, 505 P. 2d 717 (1973). These cases are cited for the proposition that subsequent owners of property who take it with knowledge that the property is subject to being demolished are not entitled to any further notice than that which they have already received. We note, however, that in one case the city had given the property owner notice that the city had a present intent to demolish the property In the other case the case the intent of the

city was not as clear, but the court found that the owner had abandoned efforts to repair the structure. In City of Dallas v.Wilson, the order given to the property owner included the following:

(1) You are granted a period of 10 days dating from the receipt of this notice in which to make application for a building permit authorizing performance of the work required to put this property into compliance with applicable codes and ordinances of the city of Dallas.

(2) You are granted a period of 120 days after issuance of that permit in which to have substantially completed the work as described in item (1) above.

(3) In the event of your failure or refusal to perform the work as described above,within the time provided in each instance, then and in that event the improvements at this location are ordered to be demolished.602 S.W. 2d at 114.

This notice left no doubt of the City's intent.

In Tingle v. City of Wichita, the court made these observations:

This court is of the opinion that once a structure has been legally condemned, the proprity of its razing and removal by the city for failure to commence repair or removal, or failure to diligently prosecute the same on the

part of the owner, is a question of fact to be determined by the finder of fact.If in the opinion of the jury, the owner had diligently prosecuted repair or removal, the city would lack authority to raze the structure, and an action would lie for demolition of the building.However, upon review of the record we are compelled to conclude the jury had ample evidence to find the appellant had abandoned repair so as to authorize the city to raze the structure by reason of the owner's failure to diligently prosecute and complete the repair. 505 P. 2d at 721

We think that in both of these cases the property owner was on notice that the city had the present intent to demolish the building in question. In the instant case appellees are not charged with such notice. Noware in the record can we find an indication that the Metropolitan Government had, as a last resort, determined to raze the building. We think that is the critical cal notice that is required to be given to any property owner before such action can be taken. See Miles v. District of Columbia,116 D. C. App.235, 510 F.2d 188 (D.C. Cir. 1975) The final issue rais-

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ed by the appellant concerns the amount of damages awared by the Trial Judge. Mr. Clay that in his opinion the house was worth $6,000.00 even though he bought the house and lot approximately six month before its destruction, for $3,500.00. The appellant submitted evidence consisting of appraisal made by the Metropolitan Tax Assessor listing the value of the property at a figure figure slightly less than the purchase price.

The owner of property is competent to give testimony as to the property's value. Union Joint Stock Land Bank of Louisville v. Knox County, 20 Tenn. App. 273, 97 S.W. 2d 842(1936). We think Mr. Clay's Testimony is evidence on which the Trial Judge could conclude that the value of the house at the time of its destruction was $6,000.00. Therefore, we find this issue to be withourt merit.

The judgment of the court below is affirmed and the cause is remanded to the Circuit

court of Davidson County for any further proceedings necessary. Tax the cost on appeal to the appellant.

Signed_____
BEN H. CANTRELL, JUDGE

CONCURRING:

Signed

_____
HENRY F. TODD, P.J.

_____
CLIFFORD E. SANDERS, JUDGE

APPENDIX C

IN THE MATTER OF:

ROOSEVELT GLASS & AMBROSE W. J. CLAY, Plaintiffs/Appellants, vs. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Acting by and through the CODES ADMINISTRATION, Defendant/Appellee.	)	DAVIDSON CIRCUIT Appeal No. 01-A-01-9003-CV-00123

FILED JUL 11 1990

A.B. NEAI, JR.CLERK

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE, AT NASHVILLE

THE HONORABLE HARRY S. LESTER, JUDGE

Ambrose W. J. Clay
P.O. Box 22642
Nashville, TN 37202
PRO SE

Richard Thompoulos
Metro Legal Department
204 Metro Courthouse
Nashville, Tennessee 37201
ATTORNEY FOR DEFENDANT/APPELLEE

AFFIRMED AND REMANDED

HENRY F. TODD, PRESIDING JUDGE

CONCURS:

SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL, JUDGE

IN THE MATTER OF:	)	
ROOSEVELT GLASS & AMBROSE W. J. CLAY,	)	
Plaintiffs/Appellants	)	
vs.	)	DAVIDSON CIRCUIT
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Acting by and through the CODES ADMINISTRATION	)	Appeal No. 01-A-11-9003 CV-00123
Defendant/Appellee.	)	

O P I N I O N

The plaintiffs, Roosevelt Glass and Ambrose W. J. Clay, appealed from a non jury judgment of the Trial Court which:

1. Dismissed plaintiffs' suit against Metropolitan Government of Nashville and Davidson County Tennessee(hereafter Metro) for personal property wrongfully removed from

plaintiffs' property by employed by Metro Codes Department to clear debris from plaintiffs' property.

2. Awarded Metro a Judgment against plaintiffs' for 903.16 upon Metro counterclaim for cost of removal of debris from plaintiffs' property.

3. Awarded to plaintiff, Ambrose W. J. Clay, a judgment against Metro for$20.00 expenses incurred in regard to said defendant's motion for default judgment.

On March 28, 1990, an order was entered by this court requiring the plaintiff-appellant Roosevelt Glass to show cause why his appeal should not be dismissed for failure to file a bond for costs on appeal. On April 2, 1990, the other plaintiff0appellant suggested the death of Roosevelt Glass. On April 17, 1990, an order was entered by this court allowing 30 days for substitution of a proper person to re-

present the interest of deceased. On June 4, 1990, an order was entered by this Court dismissing the appeal of Roosevelt Glass for failure of any person to qualify and substitute for him in this appeal.

The plaintiff-appellant, Ambrose W. J. Clay presents the following issues for review:

1. Whether the Trial Court was correct in holding that salvageable materials where CAREFULLY SORTED OUT, SHOULD BE DISPOSE[sic] by the defendant or his Agent, contrary to THE LAW GOVERNING these matters.

2. Whether the defendant and or his Agents can legally authorized [sic] or give away the plaintiffs valuable material such as automoble motors, transmission and etc.,to Wrecking Company who was awarded the job without due notice to the Appellants.

The record shows that on May 25, 1983, Ambrose W. J. Clay was notified by metro that the property at 1002 Warren Street was unsafe, unfit for human habitation and should not be so occupied until repaired and approved by Metro; that Roosevelt Glass subsequently purchased the property; that Me-

tro"s intent to demolish the house, that on April 22, 1987, Roosevelt Glass obtained a permit to demolish the house and did so, but did not remove the debris from the lot; that on December 11, 1987, at the instruction of Metro, the Haley Wrecking Company "Cleaned Up" the lot.

The superintendent of Haley Wrecking Co. testified that the debris removed from the lot contained nothing of value and that all of it was hauled to the dump and discared there.

The plaintiff Glass testified that he had demolished the house and was engaged in separating usable lumber, an inoperable truck, a trailer and certain automobile parts, some of which Glass testified belonged to him.

The gravamen of this action is that Haley Wrecking Company, at the direction of Metro, wrongfully carried away and disposed of valuable building material, equipment and parts.

There is no claim for or evidence of damage to realty. The only claim or evidence relates to loss of personalty. Under the circumstances of this case, Glass as the purchaser of the house condemned by municipal code authority had clear authority to demolish it. Glass having demolished the house, the resulting material was no longer realty, but personalty. 36A C.J.S. Fixtures § 21, P. 666.

The plaintiff Clay, therefore, had no right to the debris as part of the realty on which he held a lien. Having shown no interest in that which was removed from the lot, the plaintiff Clay, has no standing to recover for the removal. Mammoth Cave Production Credit Assn. v. Oldham, Tenn.App.1977, 569 S.W. 2d 833; Kemble v. Wolf 14 Tenn. App. 545 (1931)

As heretofore pointed out, the plaintiff Glass, who is the only person shown to have

any interest in the subject of this suit, is deceased, he interest have not been preserved by revivor in the appointment of a proper reresentative, his appeal has been dismissed, and his rights are not before this court for adjudication.

The foregoing renders moot all other issues which were raised or might have been raised in this appeal and which are pretermitted.

The judgment of the Trial court is affirmed. costs of this appeal are taxed against the plaintiff-appellant Ambrose W. J. Clay and surety on the bond for costs on appeal. The cause is remanded for such further proceedings, if any, as may be necessary and proper.

Affirmed and remanded.

Signed HENRY F. TODD, PRESIDING JUDGE

Concurs:

Signed SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN THE MATTER OF:	)	
	)	
ROOSEVELT GLASS & AMBROSE W. J. CLAY,	)	
	)	FILED OCT 22
Plaintiffs/Appellant,	)	1990, A.B. NEIL
	)	CLERK
v.	)	
	)	DAVIDSON LAW
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Acting by and through the CODES ADMINISTRATION,	)	
	)	
	)	
Defendant/Appellee.	)	

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the court is of the opinion that the application should be denied.

PER CURIAM